Capital Insurance Bhd v Kasim bin Mohd Ali

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–02–155–1995

LAMIN PCA, MOKHTAR SIDIN AND HAIDAR JJCA

6 DECEMBER 1999

Civil Procedure *— Record of appeal — Whether leave needed for supplementary appeal record to be filed out of time — Whether photostated copy and not sealed or certified true copy of order contained in supplementary appeal record is admissible — Whether court should exercise discretion to cure defects — Whether respondents should be allowed to raise preliminary objections at rehearing stage — Rules of the Court of Appeal 1994 rr 18(4)(d), 18(7) & 102*

The plaintiff filed a writ and statement of claim against the appellant. The appellant on being served with the writ and statement of claim, entered conditional appearance on 24 November 1994. On 9 December 1994, the plaintiff took out summons in chambers to strike out the appellant's conditional appearance and to obtain final judgment against the appellant. The learned judge allowed the plaintiff's application for final judgment under O 14. The appellant then appealed against the decision of the learned judge to the Court of Appeal. The Court of Appeal went on to hear the appeal on its merits and allowed the appeal by the appellant holding that there were triable issues and ordered that the case be remitted to the High Court for hearing. The plaintiff appealed to the Federal Court. The Federal Court allowed the appeal and ordered that the appeal be heard by another panel of the Court of Appeal. At the hearing, counsel for the respondents, raised preliminary objection on the ground that the record of appeal is bad in law and ought to be set aside for non-compliance with rr 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. Counsel for the respondents argued: (i) that the record of appeal does not contain a copy of the order of the court appealed from; (ii) that the supplementary appeal record was filed out of time and leave have not been obtained; and (iii) the order contained in the supplementary appeal record is only a photostated copy and not a sealed copy or a certified true copy of the sealed copy. However, counsel for the appellant submitted: (i) the sealed copy of the order was filed in the supplementary appeal record; (ii) that under Practice Direction of the Federal Court No 1 of 1992 which is applicable to the Court of Appeal with certain modifications, leave is not necessary to file the sealed copy of the order by way of a supplementary appeal record; and (iii) that the court has discretion to cure under r 102 of the Rules of the Court of Appeal. Counsel for the appellant also raised the issue that the appeal is by way of rehearing on its merits as ordered by the Federal Court and hence the respondents should not be allowed to raise preliminary objections but should proceed to hear this appeal on its merits.

Held, dismissing the appeal.

(1) The judgment to be presented for entry must be a fair copy of the judgment and not a draft judgment. A draft judgment is not a judgment since a draft implies that it needs perfection and approval (see p 199D–E); *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 followed.

(2) Although a supplementary appeal record containing the sealed copy of the order could be filed without leave of the court, the practice direction also made it clear that the filing of it should be done as soon as the appellant received the sealed order. The onus is on the appellant that the supplementary appeal record was filed soon after it received the sealed copy of the order. The appellant has not satisfied the court that the supplementary appeal record was filed in time. The failure on the part of the appellant to apply for leave to file out of time is fatal (see pp 200I–201C).

(3) Copies of documents as envisaged by the Rules of the Court of Appeal especially in respect of those important documents must be the duplicate copies or certified true copies of the originals. It is clear that the sealed copy of the order filed therein must be the original, the duplicate or a certified true copy of the original. None of this is found in any of the supplementary appeal record filed in the Registry (see p 201E–F).

(4) The rules and practice directions made by the court are to be obeyed and not to be broken. Parties to an appeal must adhere and comply strictly to those rules and directions (see p 202E). The supplementary appeal record itself is defective and as such there is nothing for the court to extend. Taking into consideration the attitude of the appellant for ignoring the defects and irregularities, after the respondents had pointed them out, the court would not exercise its discretion to help the appellant in regularising the appeal record (see p 202G–H).

(5) The issue whether the appeal record should be set aside on the ground of non-compliance with the Rules of the Court of Appeal was not decided by the Federal Court. As such, the respondents have the right to raise that issue before the court. Further, the issue of non-compliance with the Rules is by itself a merit to be decided in this appeal. When the appeal record is not filed or defective, then there is no appeal before the court for which the court could consider (see p 203G–H).

[Bahasa Malaysia summary

Plaintif telah memfailkan writ dan pernyataan tuntutan terhadap perayu. Perayu setelah diserahkan writ dan pernyataan tuntutan tersebut, telah memasuki kehadiran bersyarat pada 24 November 1994. Pada 9 Disember 1994, plaintif telah mengeluarkan saman dalam kamar untuk membatalkan kehadiran bersyarat perayu dan

untuk memperolehi penghakiman terhadap perayu. Hakim yang bijaksana telah membenarkan permohonan plaintif untuk penghakiman muktamad di bawah A 14. Perayu kemudiannya telah membuat rayuan terhadap keputusan hakim yang bijaksana tersebut kepada Mahkamah Rayuan. Mahkamah Rayuan seterusnya telah mendengar rayuan tersebut di atas merit-meritnya dan membenarkan rayuan perayu tersebut dengan memutuskan bahawa wujud isu-isu yang perlu dibicarakan dan mengarahkan agar kes tersebut diremitkan ke Mahkamah Persekutuan. Mahkamah Persekutuan telah membenarkan rayuan tersebut dan mengarahkan agar rayuan tersebut didengar oleh panel Mahkamah Rayuan yang lain. Pada perbicaraan tersebut, peguam responden-responden, telah menimbulkan bantahan awal atas alasan bahawa laporan rayuan tersebut adalah salah di sisi undang-undang dan sepatutnya diketepikan oleh sebab ketidakpatuhan dengan kk 18(4)(d) dan 18(7) Kaedah-Kaedah Mahkamah Rayuan 1994. Peguam responden-responden telah menghujahkan: (i) bahawa laporan rayuan tersebut tidak mengandungi salinan perintah mahkamah di mana rayuan tersebut dibuat; (ii) bahawa laporan tambahan rayuan tersebut telah difailkan di luar tempoh masa dan kebenaran telah tidak diperolehi; dan (iii) perintah yang terkandung di dalam laporan tambahan rayuan tersebut hanya merupakan salinan fotostat dan bukan salinan yang bermeterai atau salinan bermeterai yang disahkan. Walau bagaimanapun, peguam perayu telah menghujahkan: (i) salinan bermeterai perintah tersebut telah difailkan di dalam laporan tambahan rayuan tersebut; (ii) bahawa di bawah Arahan Amalan Mahkamah Persekutuan No 1 tahun 1992 yang terpakai kepada Mahkamah Rayuan dengan pengubahsuaian tertentu, kebenaran adalah tidak perlu untuk memfailkan salinan bermeterai perintah tersebut melalui laporan tambahan rayuan tersebut; dan (iii) bahawa mahkamah mempunyai budi bicara untuk mengatasi di bawah k 102 Kaedah-Kaedah Mahkamah Rayuan. Peguam perayu telah juga menimbulkan persoalan bahawa rayuan tersebut adalah pendengaran semula merit-meritnya sebagaimana yang telah diperintahkan oleh Mahkamah Persekutuan dan justeru itu responden-responden tidak sepatutnya dibenarkan untuk membuat bantahan-bantahan awal tetapi hendaklah terus mendengar rayuan ini atas merit-meritnya.

Diputuskan, menolak rayuan tersebut:

(1) Penghakiman yang akan dikemukakan untuk kemasukan harus merupakan salinan bersih penghakiman tersebut dan bukan draf penghakiman. Satu draf penghakiman bukanlah satu penghakiman kerana suatu draf menandakan bahawa ia memerlukan penyempurnaan dan kelulusan (lihat ms 199D–E).

(2) Walaupun laporan tambahan rayuan yang mengandungi salinan bermeterai perintah tersebut boleh difailkan tanpa kebenaran mahkamah, arahan amalan tersebut juga telah dengan jelas menyatakan bahawa pemfailan tersebut hendaklah dibuat sebaik

sahaja perayu menerima perintah bermeterai tersebut. Beban membukti adalah pada perayu di mana laporan tambahan rayuan tersebut telah difailkan sejurus setelah ia menerima salinan bermeterai perintah tersebut. Perayu telah tidak memuaskan mahkamah bahawa laporan tambahan rayuan tersebut telah difailkan di dalam tempoh masa. Kegagalan di pihak perayu untuk memohon kebenaran untuk memfail di luar tempoh masa membawa padah (lihat ms 200I–201C).

(3) Salinan-salinan dokumen sebagaimana yang dibayangkan oleh Kaedah-Kaedah Mahkamah Rayuan terutamanya berhubung dengan dokumen-dokumen penting mestilah salinan pendua atau salinan yang disahkan daripada yang asalnya. Adalah jelas bahawa salinan bermeterai perintah tersebut yang telah difailkan itu mestilah yang asal, salinan pendua atau salinan yang disahkan daripada yang asalnya. Tiada mana-mana yang tersebut dijumpai di dalam mana-mana laporan tambahan rayuan yang telah difailkan di bahagian Pendaftaran tersebut (lihat ms 201E–F).

(4) Kaedah dan arahan amalan yang dibuat oleh mahkamah harus dipatuhi dan tidak dilanggari. Pihak-pihak kepada suatu rayuan mestilah menuruti dan mematuhi dengan betul-betul kaedah-kaedah dan arahan-arahan tersebut (lihat ms 202E). Laporan tambahan rayuan tersebut dengan sendirinya adalah cacat dan oleh demikian tiada apa yang boleh dilanjutkan mahkamah. Dengan mempertimbangkan sikap perayu yang tidak mengendahkan kecacatan dan luar aturan tersebut, setelah responden-responden menegaskannya, mahkamah tidak akan menggunakan budi bicaranya untuk membantu perayu di dalam melaraskan laporan rayuan tersebut (lihat ms 202G–H).

(5) Persoalan sama ada laporan rayuan tersebut patut diketepikan atas alasan ketidakpatuhan dengan Kaedah-Kaedah Mahkamah Rayuan tidak diputuskan oleh Mahkamah Persekutuan. Oleh demikian, responden-responden mempunyai hak untuk membangkitkan isu tersebut di hadapan mahkamah. Selanjutnya persoalan ketidakpatuhan dengan Kaedah-Kaedah Mahkamah Rayuan adalah dengan sendirinya satu merit yang harus diputuskan di dalam rayuan ini. Apabila laporan rayuan tersebut tidak difailkan atau cacat, maka tiada rayuan yang boleh dihadapkan ke mahkamah yang perlu dipertimbangkan (lihat ms 203G–H).]

Notes

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

Cases referred to

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)

Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor [1997] 2 MLJ 681 (folld)

Nyana Pandithan v Vettiveloo Kasinathan & Ors [1997] 1 CLJ Supp 30 (refd)

Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd [1996] 2 CLJ 130 (refd)

Legislation referred to

Practice Direction of the Federal Court No 1 of 1992

Practice Direction No 1 of 1995

Rules of the Court of Appeal 1994 rr 18(4)(d), 18(7), 102

Manjit Singh (*C Sri Kumar* with him) (*Sri Ram & Co*) for the appellant.

Yusuf Khan (*BS Sidhu & Sharon Sidhu*) (*BS Sidhu & Co*) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court): We have dismissed this appeal earlier when we upheld the preliminary objection raised by the respondent. We now give our reasons for doing so. To have the proper understanding of coming to that decision it is necessary to follow the chronology of events leading to this appeal.

Sometime in 1990, one Kasim bin Mohd Ali (now deceased) ('the plaintiff') filed a writ and statement of claim against Mohd Marudi bin Kasmuri and Abd Rahman bin Derman ('the defendants') in the High Court, Shah Alam (Civil Suit No 23–129–90) whereby the plaintiff claimed damages from the defendants for injuries and damages suffered by him in a motor accident involving motor vehicle No BBQ 7196, driven and owned by the defendants. The plaintiff obtained judgment against both defendants in the sum exceeding RM400,000. The plaintiff found out that that motor vehicle No BBQ 7196 was under a third party risk cover note with the Capital Insurance Bhd ('the appellant'). Realizing that he could not recover the full judgment sum from the defendants, the plaintiff then took up an action against the appellant. In November 1994, the plaintiff filed a writ and statement of claim against the appellant (Civil Suit No 23–91–1994). The statement of claim was subsequently amended. In his statement of claim, the plaintiff claimed that the appellant issued a third party risk insurance policy on motor vehicle No BBQ 7196 at the time when the accident occurred. In the statement of claim the plaintiff stated that the notice to commence proceedings of Civil Suit No 23–129–90 was served on the appellant sometime in July 1988. Under s 96(1), Road Traffic Ordinance 1958, the appellant being the insurer of motor vehicle No BBQ 7196, is responsible to pay the damages awarded earlier by the court in Civil Suit No 23–129–90 against the defendants.

The appellant on being served with the writ and statement of claim (Civil Suit No 23–91–1994) (the present action), entered conditional appearance on 24 November 1994. Apparently no step was taken by the appellant to strike out the writ. On 9 December 1994, the plaintiff took out summons in chambers to strike out the appellant's conditional appearance

and to obtain final judgment against the appellant under O 14 of the Rules of the High Court 1980. Before this application was heard, the appellant filed its defence to the amended statement of claim. The statement of defence was dated 28 December 1994. A

On 9 February 1995 after hearing the parties the learned judge allowed the plaintiff's application for final judgment under O 14. The appellant then appealed against the decision of the learned judge to this court. When this case came up for hearing for the first time in this court, the plaintiff had passed away. At that hearing, counsel for the plaintiff made two separate applications: B

(1) to substitute one Asiah bte Abdul Manap, the widow of the plaintiff, as the respondent in the proceedings; C

(2) to strike out the notice of appeal and the records of appeal on the ground that the appellant had not complied with r 18(4)(d) of the Rules of the Court of Appeal 1994.

Apparently the then Court of Appeal advised the first application to be withdrawn. As to the second application the Court of Appeal overruled the objection. The Court of Appeal went on to hear the appeal on its merits and allowed the appeal by the appellant holding that there were triable issues and ordered that the case be remitted to the High Court for hearing. D

Being dissatisfied with the decision of the Court of Appeal, the widow and the son of the plaintiff appealed to the Federal Court. The Federal Court by its judgment dated 23 July 1998 allowed the appeal and ordered that the appeal be heard by another panel of the Court of Appeal. E

Hence the appeal before us now.

At the hearing of this appeal on 26 August 1999 counsel for the appellant made an application by way of a Motion to substitute Asiah bte Abdul Manap and Ahmad bin Kasim (the appellants in the Federal Court) in place of the deceased plaintiff to be the respondents in the present appeal. By consent the order for substitution was made. F

At the hearing counsel for the respondents, Mr BS Sidhu, raised this preliminary objection on the ground that the record of appeal is bad in law and ought to be set aside for non-compliance with rr 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. The reasons for non-compliance as stated by counsel for the respondents are: G

(a) the record of appeal does not contain the sealed copy of the judgment appealed from; and

(b) the record of appeal does not contain a copy of the order of the court appealed from. H

It is necessary at this stage to look into rr 18(4)(d) and 18(7) which read as follows:

18 Memorandum of appeal I

...

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including —

A (a) ...
(b) ...
(c) ...
(d) a copy of the judgment, decree or order appealed from;
...

(7) The memorandum and copies above referred to which, together
B shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the court may allow.

It was submitted by counsel for the respondents that the appeal record as it is had only the draft order dated 9 February 1995 as seen at pp 7–10 of the
C record of appeal. Though counsel referred to this as judgment of the court, it is clear to us that what he meant was the order. As can be seen from the record itself, the order at pp 7–10 of the record was a draft order approved by solicitors for both sides. There is no indication that this order had been faired and approved by the deputy registrar of the High Court. What is more important is that it has not been sealed. There is a slight variation between
D this order and the one allegedly to be the sealed order which is found in the supplementary appeal record (to which the respondents had also raised their objection).

The Supreme Court had made it clear that the judgment to be presented for entry must be a fair copy of the judgment and not a draft
E judgment. In the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 the Supreme Court held that it must be a fair copy of the judgment that should be presented for entry in compliance with all the requirements of the Rules of the High Court 1980. A draft judgment is not a judgment since a draft implies that it needs perfection and approval.

F Apparently, the appellant conceded that the order found at pp 7–10 of the record is not the sealed copy of the order. As such we are of the view that the draft order should not be in the record. Counsel for the appellant while conceding that the order at pp 7–10 is only a draft order, the appellant had ratified it by filing a sealed copy of the order in the supplementary appeal record.

G As to the order found in the supplementary appeal record, counsel for the respondents contended that the supplementary appeal record should not be admitted because it was filed out of time which is in contravention of r 18(7) and no leave had been obtained to file it out of time. Further, even if the supplementary appeal record is admitted the order contained therein
H is not admissible because it is only a photostat copy of purportedly to be a sealed copy of the order.

It is clear to us and not denied by counsel for the appellant that the supplementary appeal record was filed out of time and they have not obtained leave to do so. It was submitted by counsel for the appellant that
I under Practice Direction of the Federal Court No 1 of 1992 which is applicable to the Court of Appeal with certain modifications as provided for by Practice Direction No 1 of 1995, leave is not necessary to file the sealed copy of the order by way of a supplementary appeal record. The relevant

provision in respect of the Practice Direction No 1/92 of the Supreme Court reads as follows:

> Untuk menyegerakan prosiding rayuan di Mahkamah Agong, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.

We agree that a supplementary appeal record containing the sealed copy of the order could be filed without leave of the court. The practice direction also made it clear that the filing of it should be done as soon as the appellant received the sealed order. It is not known when the sealed order was received by the appellant or its solicitors and it is not stated anywhere when the supplementary appeal record was filed in court. We have gone through the chronology of events submitted by the appellant but we could not find the date when this was done. We are not even sure that the supplementary appeal record was ever filed at the Registry. We are of the opinion that the onus is on the appellant to satisfy us that the supplementary appeal record containing only the sealed copy of the order was filed soon after the sealed copy of the order was received by the appellant. The appellant has failed to do so.

Counsel for the respondents also submitted that even though there is a Practice Direction there is a need to apply by way of formal application for an extension of time to file the supplementary appeal record out of time. It was submitted that the supplementary appeal record was filed separately from the record of appeal and it was not done within the period specified by r 18(7). As such the filing of it was in contravention of rr 18(7) and 18(9) of the Rules of the Court of Appeal. Counsel for the respondents cited the case *Nyana Panditha n v Vettiveloo Kasinathan & Ors* [1997] 1 CLJ Supp 30. With the greatest respect to counsel for the respondents there is a distinction between that case and the present appeal in that there is no Practice Direction which allows the supplementary appeal record to be filed without leave. Though we are of the view that the case is not applicable in the present appeal, we take note the issue taken by counsel for the respondents in that the Rules of the Court and the practice directions are to be adhered to. It is the requirement of r 18(10) that the appellant shall submit a chronology of events until the filing of the record of appeal. Rule 18(10) provides as follows:

> The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry.

There is no doubt in our mind that the supplementary appeal record (rekod rayuan tambahan) is part of the appeal record. At the very minimum the chronology of events will tell us when the sealed order was received by the appellant or its solicitors and when the supplementary appeal record was filed.

It is clear to us that the practice direction allowed an appellant to file without leave a sealed copy of the order not received with the notes of

A evidence and the judgment in a separate bundle which is called the supplementary appeal record when the order was not received in time and it must be done as soon as the appellant received the sealed copy of that order. Nowhere it is stated in the practice direction that if it is not done in time (reasonable time after receiving the sealed copy of the order) that it could be filed without leave of the court. The onus is on the appellant that B the supplementary appeal record was filed soon after it received the sealed copy of the order. Rule 18(7) makes it clear that all filing of documents must be done within the stipulated time. It is imperative to us that an appellant is not allowed to file the supplementary appeal record at any time it likes just because of the practice direction. In our view, whatever supplementary C appeal record to be filed pursuant to that practice direction, it must be done within the stipulated time otherwise leave of the court must be obtained. In this appeal the appellant has not satisfied us that the supplementary appeal record was filed in time. In our opinion the failure on the part of the appellant to apply for leave to file out of time is fatal.

D Another issue taken up by counsel for the respondents in respect of the supplementary appeal record is that the order contained inside is only a photostat copy and not a sealed copy or a certified true copy of the sealed copy. We have checked all the supplementary appeal records filed in the Registry and they are the same as the one we are having. It is clear to us the sealed copy of the order was only photostat copies without any certification. E The certification found thereon was also photostated. Counsel for the appellant admitted that the whole appeal record and the supplementary appeal record are photostat copies because the Rules of the Court of Appeal do not require the originals. They require only copies of the proceedings. Photostat copies are copies of the proceedings. With the greatest respect to F the learned counsel for the appellant copies of documents as envisaged by the Rules especially in respect of those important documents must be the duplicate copies or certified true copies of the originals. It is clear to us that the sealed copy of the order filed therein must be the original, the duplicate or a certified true copy of the original. None of this is found in any of the supplementary appeal record filed in the Registry. We agree with what had G been said by Mohd Hishamudin Mohd Yunus J in the case of *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 CLJ 130 at p 133:

> Finally, there is one related issue: what does the word 'copies' in O 49 r 6(3) mean in relation to 'decision' in paragraph (d) of subrule (3)? Does it mean mere photostat copies of the decision? In the present case I observe that what H had been enclosed in the appeal record are mere photostat copies of the draft judgment. Now, O 29 r 11 provides for the issuance of a duplicate of a judgment to any party to a proceeding who applies for it upon payment of the prescribed fee, and O 52 r 4(1)(b) provides for the issuance of a certified copy of a judgment to any person who applies for it upon payment of the prescribed fee. In my view, 'copies' in relation to decisions does not refer to mere I photostat copies of the decision: it refers to either duplicates of the decision obtained pursuant to O 29 r 11 or, alternatively certified copies of the decision obtained pursuant to O 52 r 4(1)(b). Uncertified photostat copies are not 'copies' for the purpose of subrule 3(d). ...

The same view was adopted by Nik Hashim JC in the case of *Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor* [1997] 2 MLJ 681.

For the reasons stated above we agree with the contention of the learned counsel for the respondents that the record of appeal is bad in law and should be set aside.

Counsel for the appellant raised the issue that even if the record of appeal is bad it is curable. He submitted that the court has a discretion to cure this under r 102 of the Rules of the Court of Appeal. Rule 102 provides:

> Non-compliance with Rules not to render proceedings void
>
> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

Appellant's counsel urged the court to use its discretion to cure the defects and not to set aside the appeal record. Alternatively, counsel for the appellant applied orally for extension of time to file the supplementary appeal record. Counsel for the respondents made it clear to the appellant from the very beginning that they were going to object to the admission of the appeal record. They did this even before this appeal went up to the Federal Court but the appellant did nothing to ratify or take any step to cure the irregularities. They chose to ignore the mistakes they had made. In our view the rules and practice directions made by this court are to be obeyed and not to be broken. We would like to stress here that parties to an appeal must adhere and comply strictly to those rules and directions. Of late, we found that there were numerous instances where parties had not adhered or complied to those rules and directions and we want to make it clear that they do so at their own risk. Getting back to the appeal, it is clear to us that the appellant was given notice of the defects in the appeal record and the filing but did nothing to ratify the defects or to take the necessary step to remedy them. As submitted by counsel for the respondent the appellant knew of these defects which were pointed out to the appellant, it is too late in the day to apply for extension of time to file the supplementary appeal record out of time. Our answer to the application for extension of time is that we find the supplementary appeal record itself defective and as such there is nothing for us to extend. Taking into consideration the attitude of the appellant for ignoring the defects and irregularities, after the respondents had pointed them out, we would not exercise our discretion to help the appellant in regularizing the appeal record. We felt that the preliminary objections raised by counsel for the respondents were well taken.

Counsel for the appellant also raised the issue that this appeal is by way of rehearing on its merits in this court as ordered by the Federal Court. In view of that the respondents should not be allowed to raise preliminary objections but should proceed to hear this appeal on its merits. In our view the Federal Court in its judgment made it clear that they decided the appeal

on a specific question referred to it. Chong Siew Fai Hakim Besar Sabah dan Sarawak, delivering the judgment of the court, made this very clear in his judgment when he said:

> We note that this court granted leave to appeal on the specific question as to whether the order of the Court of Appeal dated 25 July 1995 should be set aside since it was made after the deceased Kasim had died and no order of substitution or to carry on the proceedings under r 41 of the Rules of the Court of Appeal 1994 had been given. The said r 41 provides for reconstitution of an appeal in the event of certain changes affecting a party eg death or affecting the interest or liability of a party. Where an appellant (or a respondent) dies, the appeal does not, by that reason alone, become abate (r 40). The proper thing to do at that stage would be for the personal representative, if any, or any person interested to apply under r 41 for a substitution order or an order to carry on the proceedings. In our present case, an application for substitution was made to the Court of Appeal but no order was granted thereunder, resulting in the hearing of the appeal and the grant of the order dated 25 July 1995 in proceedings in which not only a properly constituted respondent was wanting but also Mr BS Sidhu purportedly acting on a retainer that had lapsed on his client's death. The fact that Mr BS Sidhu was given the liberty to submit at the hearing is, to our mind, irrelevant because when he did so, there was no properly constituted party on whose behalf he could act and that what he did in the Court of Appeal was without any proper mandate or instructions.
>
> On the particular facts and circumstances of this case, following *Daimler Company Ltd v Continental Tyre And Rubber Company (Great Britain) Ltd*, we are of the view that the proceedings that took place in the Court of Appeal on 25 July 1995 are irregular, and that they together with the order made therein on the same day should be set aside.
>
> This appeal is accordingly allowed with costs here and in the Court of Appeal to the estate of the deceased Kasim. All that part of the proceedings before the Court of Appeal on 25 July 1995 connected with and leading to the making of the Order dated 25 July 1995 as well as the said Order are hereby set aside. Since Kasim died on 12 May 1995 ie after the appeal in the Court of Appeal was brought by Notice dated 10 February 1995, the appeal had not abated. We order that the appeal be re-heard on its merits by a differently constituted panel of the Court of Appeal with the present appellants before us as the respondents in place of the deceased Kasim (if the present appellants so desire) or an application for an appropriate substitution order be made. ...

From this it is clear to us that the Federal Court decided on the specific question of the re-constitution of the party which was decided earlier by the other panel of this court. The issue whether the appeal record should be set aside on the ground of non-compliance with the Rules of the Court of Appeal was not decided by the Federal Court. As such the respondents have the right to raise that issue before us. Further, we are of the view the issue of non-compliance with the Rules is by itself a merit to be decided in this appeal. It is clear to us that when the appeal record is not filed or defective then there is no appeal before us for which we could consider.

For the above reasons, we uphold the preliminary objections by the respondents. We hold that the appeal record and the supplementary appeal record are defective. We also hold that the supplementary appeal record was

filed out of time without any leave of the court. Therefore, there is no proper appeal record before us for us to consider. This appeal is hereby dismissed with costs. Costs awarded is for a single counsel. Deposit to the respondent towards account of taxed costs.

Appeal dismissed.

Reported by Benjamin Yong